IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 165.

HOMARD P. DORSEY,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioner.

INDEX

Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Rule Involved	4
Statement	5
Specifications of Errors to Be Urged	5
Reasons for Granting the Writ	6
Conclusion	11
Appendix—	
Judgment	A1
Decision of the Court of Appeals for the Sixth Circuit	A2

Table of Cases

Bacon v. *U. S.*, 127 F.2d 985	7
Bauer v. *U. S.*, 299 Fed. 10	8
Burkhardt v. *U. S.*, 13 F.2d 841	8
Eagan v. *U. S.*, 137 F.2d 369, cert. denied 320 U.S. 788	7
Lucadamo v. *U. S.*, 280 Fed. 653	8
Marrash v. *U. S.*, 168 Fed. 225	8
Moss v. *U. S.*, 132 F.2d 875	8
Panci v. *U. S.*, 256 F.2d 308	9
Taylor v. *U. S.*, 269 F.2d 737	9
Turcott v. *U. S.*, 21 F.2d 829	8
U. S. v. *Carminati*, 247 F.2d 640, cert. denied 355 U.S. 883	9

U. S. v. Dennis, 183 F.2d 201 9
U. S. v. Gerke, 125 F.2d 243, cert. denied 316 U.S. 667 7
U. S. v. Goldsmith, 91 F.2d 983, cert. denied 302 U.S. 718 9
U. S. v. Konovsky, 202 F.2d 721 9
U. S. v. Lancaster, 44 Fed. 896 8
U. S. v. Moloney, 200 F.2d 344 8

STATUTE AND RULE

Federal Rules of Criminal Procedure, Rule 52 4, 6
18 U.S.C., Section 371 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. .

HOMARD P. DORSEY,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Homard P. Dorsey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 24, 1961.

OPINION BELOW.

The District Court did not render a written opinion. The decision and judgment of the Court of Appeals for the Sixth Circuit are annexed hereto as an appendix, on page A1.

JURISDICTION.

The judgment of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

(1) Is there substantial evidence to support the verdict of the jury and the judgment of the United States District Court based thereon?

(2) Was it error for the United States District Court to admit, over the objection of petitioner's counsel, the following testimony of federal officer J. N. Petre:

"Q. Go ahead and state what was said.

A. One of them stated that that 'G-d "Pot" and Harry wouldn't even get a watchman for us. They are funny people. They are all for themselves. I tried to get one of them to get Woodrow to watch for us at night, but they wouldn't.' He said, 'I don't want to go to the G-d pen over these stills.'

Q. Do you know anybody in that area named 'Pot'?

A. I do.

Q. Do you know more than one person?

A. No, I do not.

Q. Who is that?

A. Homard 'Pot' Dorsey.

Q. Is he in the courtroom?

A. Yes, sir.

Q. Do you know any person by the name of Woodrow?

A. Yes, sir, I do.

Q. Who is that?

A. Woodrow Denton.

Q. In relation to these stills, where is his home located?

A. Approximately 35 yards across the Cosby highway.

Mr. Ray H. Jenkins: May I ask which home he is talking about?

The Court: Yes, sir.

Which home?

The Witness: The Denton home, Woodrow Denton home.

By Mr. Ray L. Jenkins:

Q. You heard them say they wouldn't get Woodrow, that they tried to get Woodrow?

A. One of them stated he tried to get 'Pot' and Harry to get Woodrow to watch for them."

(3) Was it error for the United States District Court to admit, over the objection of petitioner's counsel, the following testimony of federal officer Pardini:

"Q. While they were unloading the truck, did you hear any conversation?

A. I did. One of them stated, in substance, that Harry and 'Pot' were too cheap to get a watchman for them and they didn't care to go to the penitentiary over those stills."

(4) Did the United States District Court err in charging the jury as follows:

"It sometimes happens in criminal prosecutions, where two or more persons have participated in the commission of crime, that one of those persons becomes a witness for the Government against the other participants. Testimony of such a witness is classified as that of an accomplice. The testimony of an accomplice is admissible and entitled to such weight as the jury feels it should have. In weighing the evidence of an accomplice, you should give due regard

to the fact that he might have been on trial as a defendant himself. You should weigh his testimony carefully and cautiously. You should not place too firm a reliance upon the testimony of an accomplice unless his testimony is corroborated by the testimony of witnesses who were not accomplices, or corroborated by facts and circumstances in evidence that indicate the truthfulness of the testimony of the accomplice. The verdict of guilty should not be based upon the testimony of an accomplice unless that testimony, in consideration of all the circumstances presented to the jury, leaves in the minds of the jurors no reasonable doubt of its truth."

STATUTE INVOLVED.

18 U.S.C., Section 371:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

RULE INVOLVED.

Federal Rules of Criminal Procedure.

Rule 52. *Harmless Error and Plain Error.*

(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT.

Petitioner was convicted in the United States District Court for the Eastern District of Tennessee, Northeastern Division, on September 23, 1969, in a one count indictment charging a violation of 18 U.S.C., Section 371, in that petitioner allegedly conspired with others to violate Sections 5174, 5179, 5601(a)(1), 5606, 5173, 5601(a)(4), 5216, 5222, 5601(2)(7), 5008(b), 5642, 5205(a)(2), 5604(a)(1), 5686, 5681, 7201 and 7206 of the Internal Revenue Code of 1954. All of said Code sections pertain to the illicit manufacture and possession of distilled spirits on which the tax has not been paid, and to the distilling of such spirits and the possession of same without complying with the Internal Revenue Code.

Petitioner received the maximum sentence, to-wit: five years, and is now enlarged upon bail in the penal sum of $5,000.00.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) There was substantial evidence to support the verdict of the jury and the judgment of the District Court based thereon.

(2) It was not error for the District Court to admit, over the objection of petitioner's counsel, that portion of federal officer Petre's testimony, which is quoted under "Questions Presented", above, as (2).

(3) It was not error for the District Court to admit, over the objection of petitioner's counsel, the testimony of

federal officer Pardini as set forth under "Questions Presented", above, as (3).

(4) It was not reversible error, or prejudicial error, for the District Court to charge the jury as is set forth under "Questions Presented", above, as (4).

REASONS FOR GRANTING THE WRIT.

The questions here presented are substantial ones, and we feel are of wide-spread importance in that there is a conflict between the decision of the United States Court of Appeals for the Sixth Circuit in this case and other circuits as to what constitutes sufficient evidence to warrant a conviction in a conspiracy case. The questions presented here are substantial also in that if the decision of the Court of Appeals for the Sixth Circuit is permitted to stand in this case, we feel it amounts to a complete abrogation of Rule 52, Federal Rules of Criminal Procedure, in that the Court of Appeals recognized in this case that the matters complained of with respect to the introduction of evidence and the charge to the jury were erroneous, but denied that the errors were "plain error" such as may be noticed by the Court of Appeals although not brought to the attention of the trial court. As will be shown hereinafter, the errors had the effect of denying petitioner a fair trial; and as will be shown, the errors were certainly grievous ones and could not have had any other effect than to prejudice the petitioner in the eyes of the jury. We think the jury undoubtedly based its verdict on the matters complained of herein as error, but which the Court of Appeals for the Sixth Circuit said was not "plain error". Petitioner's counsel in the Court of Appeals and here was not trial counsel.

Specification of Error No. (1). The sum and substance of the government's proof in this case is that whiskey violators parked their vehicles in front of petitioner's grocery store and garage on numerous occasions; that petitioner as a mechanic did repair work on vehicles which had been, and were later used to haul supplies to illicit distilleries and whiskey therefrom; petitioner on one occasion sold from his grocery store 24 bottles of isopropyl alcohol to an alleged conspirator; petitioner as a mechanic welded in his garage a broken place on an oil burner; an illicit distillery was found on petitioner's land which is located in a remote mountainous area covered with timber and underbrush; petitioner purchased for resale from his grocery store sugar, yeast, fruit jars and isopropyl alcohol; petitioner purchased 250 feet of electric wiring, a water pump, 100 feet of garden hose, and 120 cinder blocks.

What the conviction in this case amounts to is that the government convicted petitioner by use of the method known as "guilt by association" with others who were guilty.

The government relied upon knowledge, acquiescence, and indifference to violations by others to support conviction of petitioner. This Court has approved a decision stating that such is insufficient to support a conviction. *Egan v. U. S.*, 137 F.2d 369, cert. denied 320 U.S. 788.

In this case, the government relied for conviction upon the assertion that petitioner sold from his grocery, sugar, isopropyl alcohol, yeast, and fruit jars to persons whom he knew might use them in the manufacture of illicit distilled spirits. Mere knowledge that material or merchandise sold by one to another would be used for unlawful purposes is not sufficient to charge the seller as a co-conspirator. *U. S. v. Gerke*, 125 F.2d 243, cert. denied 316 U.S. 667; *Bacon v. U. S.*, 127 F.2d 985.

The government also relied for conviction of petitioner upon the insistence that he knew of the illegal activities of others and, still associated with them. This has been held to be insufficient to convict on a conspiracy charge. *Turcott* v. *U. S.*, 21 F.2d 829; *Burkhardt* v. *U. S.*, 13 F.2d 841; *Lucadamo* v. *U. S.*, 280 Fed. 653; *Marrash* v. *U. S.*, 168 Fed. 225; *U. S.* v. *Lancaster*, 44 Fed. 896.

The government also relied for conviction on the fact that there were casual associations by petitioner with known conspirators. This has been held insufficient to convict. *U. S.* v. *Moloney*, 200 F.2d 344.

The government relied for conviction upon the fact that petitioner rented a tenant house to one of the known conspirators. This has been held insufficient to convict. *Moss* v. *U. S.*, 132 F.2d 875.

The government made much of the fact that numerous vehicles which were seen at distilleries, being driven by others than petitioner, were later seen parked at petitioner's garage and store. This has been held insufficient to convict. See *Bauer* v. *U. S.*, 299 Fed. 10.

Cosby, Tennessee, is located in a remote area of the Great Smoky Mountains. In such communities, this Court must judicially know it is customary for those of the community to congregate around the "country store" such as the one owned by petitioner. Yet, the government relied upon such congregation as constituting overwhelming evidence that petitioner was engaged in the conspiracy.

The evidence showed that petitioner is a substantial businessman in his community. He is engaged in the raising of broiler chickens, producing some 26,000 broilers every nine weeks. Petitioner owns a garage where he does mechanic work. He served honorably in the United States

Army as a mechanic. He runs a "country store", and he also raises tobacco.

There was no substantial evidence in this case to support a conviction of petitioner.

Specification of Error No. (2). The admission of the evidence assigned by this Specification of Error was highly prejudicial and the testimony was rank hearsay, and its admission erroneous.

First, the statement, if admissible otherwise, was not made pursuant to a conspiracy, but was a mere recital of disappointment and could under no stress of the imagination be construed as having been a statement made pursuant to a conspiracy, or in furtherance of a conspiracy. See *U. S. v. Carminati*, 247 F.2d 640, cert. denied 355 U.S. 883; *U. S. v. Goldsmith*, 91 F.2d 983, cert. denied 302 U.S. 718; *Taylor v. U. S.*, 269 F.2d 737; *Panci v. U. S.*, 256 F.2d 308; *U. S. v. Konorsky*, 202 F.2d 721; *U. S. v. Dennis*, 183 F.2d 201.

There was an objection made by petitioner's counsel to the admission of this testimony and the District Court permitted its introduction over this objection, with a charge to the jury as appears at A3, attached hereto. This charge we submit was erroneous in view of the fact that the statement could not have been one admissible as being pursuant to the conspiracy, or in furtherance thereof. The charge of the District Court with respect to the admission of the testimony (see A3, hereof) is a correct statement of the law, but was wholly inapplicable in view of the circumstances under which the statement was made and the verbiage contained therein. It was further error to admit this testimony in that petitioner was not identified in the statement admitted by the District Court. The

only identification contained in the statement was "* * * that G-d 'Pot' * * *", and no last name was mentioned.

Specification of Error No. (3). This Specification of Error pertains to the admission of evidence concerning the same conversation about which officer Petre testified, and covered in Specification of Error No. (2), above. At this time, however, the evidence was again admitted by federal officer Pardini and had the effect of duplicating the erroneous admission of the testimony by officer Petre. This was not only an additional error, but accentuated the error of the District Court in admitting the testimony of officer Petre.

The same law applies to this Specification of Error as that cited under Specification of Error No. (2), above.

Specification of Error No. (4). There was no accomplice's testimony in the case. However, the District Court charged the law with respect to the testimony of an accomplice. As was pointed out during oral argument of the case in the Court of Appeals for the Sixth Circuit, by one of the Judges thereof, the giving of this erroneous charge concerning testimony of an accomplice no doubt was considered by the jury as applying to the statements of alleged conspirators, which the officers say they heard made at a distillery site, which error is assigned in Specifications of Error Nos. (2) and (3), above.

If the jury considered this charge with respect to an accomplice at all, since there was no accomplice testimony, the charge would have to apply to the statements made by alleged conspirators as set forth in Specifications of Error Nos. (2) and (3), above, and thus the charge with respect to an accomplice compounded the errors of the District Court as set forth in Specifications Nos. (2) and (3), above.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioner.

JUDGMENT.

May 24, 1961.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s Lester L. Cecil,

United States Circuit Judge.

No. 14,404.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOMARD P. DORSEY, Defendant-Appellant.	ON APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

(Filed May 24, 1961, Carl W. Reuss, Clerk.)

Decided May 24, 1961

Before: McALLISTER, CECIL and O'SULLIVAN, Circuit Judges.

CECIL, Circuit Judge. This is an appeal by Homard P. Dorsey from a verdict and judgment of conviction in the United States District Court for the Eastern District of Tennessee, Northeastern Division.

The appellant, together with eight other defendants, was indicted under section 371 of Title 18, U.S.C., for conspiracy to violate sections 5174, 5179 and 5601 (a)(1) of the Internal Revenue Code of 1954, as amended. The violation involves the illegal manufacture, possession, transportation and sale of spiritous liquors. The facts constituting the offense are fully and specifically set forth in the indictment.

It is claimed on behalf of the appellant that there is not substantial evidence to support the verdict of the jury and the judgment based thereon. A reading of the record discloses that no motion for acquittal was made by counsel for Homard P. Dorsey either at the close of the govern-

ment's case in chief or at the conclusion of all of the evidence.

The question presented is purely one of fact. Upon reading the entire record and upon consideration of the evidence relating to Howard P. Dorsey, as a whole, we conclude that there was sufficient evidence to justify the jury in finding that Howard P. Dorsey was a party to the conspiracy as averred in the indictment and that he was guilty as charged.

Other questions raised relate to the admission of testimony. On two occasions the trial judge admitted conversations of alleged co-conspirators to the effect that the appellant Dorsey would not get a watchman for them. The record discloses that no objections were made to the admission of this testimony.

In the first instance, counsel for Dorsey said: "Now, of course, your Honor will instruct the jury as to what anybody said, the men that were present."

Thereupon the Court instructed the jury as follows: "Gentlemen of the jury, this alleged statement, alleged to be made by these men, will not be considered except with respect to their cases. Unless the jury finds, first, there was a conspiracy, and, second, that these statements were made in furtherance of the conspiracy. If the jury so finds, then the jury will consider the alleged statement with respect to all of the defendants."

The witness answered and no further question was raised.

The instruction of the trial judge, as quoted above, is a clear and correct statement of the law of conspiracy. *Continental Baking Company* v. *United States*, 281 F.2d 137, 152, C.A. 6; *Glasser* v. *United States*, 315 U.S. 60, 74.

"It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." *Delli Paoli* v. *United States*, 352 U.S. 232, 242. See also: *Opper* v. *United States*, 348 U.S. 84, 95.

The trial judge instructed the jury on the subject of the weight to be given to the testimony of an accomplice. No accomplices testified on behalf of the government and the appellant charges that this is reversible error.

Counsel for the appellant Dorsey made neither specific nor general objections to the charge of the court. In accordance with Rule 30 of the Federal Rules Criminal Procedure, no objection to the charge can now be raised on appeal.

This is not such a "plain error" as to warrant the consideration of this Court, without objection, and we are of the opinion that it was not prejudicial to the appellant. Rule 52, Federal Rules Criminal Procedure.

The judgment of the District Court will be affirmed.

LIBRARY
SUPREME COURT, U. S.

No. 165

JAMES R. BROWNING, Clerk

Office-Supreme Court, U.S.
FILED
JUL 21 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

HOMARD P. DORSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Direct Sales Co. v. *United States*, 319 U.S. 703	7
Glasser v. *United States*, 315 U.S. 60	8
Delli Paoli v. *United States*, 352 U.S. 232	8
Blumenthal v. *United States*, 332 U.S. 539	8

Rule:

Rule 30, F.R. Crim. P.	2, 9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 165

HOMARD P. DORSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 330-332; Pet. App. 2-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961 (R. 329; Pet. App. 1). The petition for a writ of certiorari was filed on June 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the petitioner's conviction for having conspired to manufacture, possess, and distribute untaxed whiskey.

2. Whether certain statements of conspirators made in furtherance of the conspiracy were admissible into evidence.

3. Whether the petitioner, who did not object to the charge, was prejudiced by the fact that the trial court instructed the jury with respect to testimony by accomplices, although no accomplices testified for the government.

RULE INVOLVED

Rule 30, F. R. Crim. Proc., provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

STATEMENT

An indictment returned in the District Court for the Eastern District of Tennessee charged the petitioner and eight others with having conspired from about June 1, 1959, to April 13, 1960, to manufac-

ture, possess, and distribute untaxed whiskey, and to possess goods and commodities used in the manufacture of whiskey, in violation of various sections of the Internal Revenue Code (R. 5-13). Following a trial by jury, the petitioner and six others were convicted (R. 325). The petitioner was sentenced to five years' imprisonment (R. 15). On appeal the court of appeals unanimously affirmed the conviction of petitioner, who was the only defendant to appeal (R. 329, 330-332; Pet. App. 1, 2-4).

The pertinent evidence may be summarized as follows:

1. For several years prior to 1959, the petitioner, who had the nickname "Pot", owned and operated a chicken farm in Cosby, Cocke County, Tennessee. He also repaired automobiles and operated a small grocery store on his premises (R. 88-89, 180-182, 208-213). From June 1, 1959, to April 13, 1960, the Taylor Grocery Company of Newport, Tennessee (a city near Cosby), sold the petitioner 77,200 pounds of sugar, 190 cases of isopropyl alcohol (24 bottles per case),[1] most of which was "Craig" brand, 195 cartons of yeast (54 packages per carton), and 2,300 dozen half-gallon fruit jars (27,600 jars) (R. 40-43; see R. 224-228, 232, 236-237, 241, 243).

2. On August 13, 1959, Alcohol Tax Unit agents found several illegal distilleries in the Cosby area of Cocke County, and set up observation positions near

---

[1] Isopropyl alcohol is used as an additive to whiskey to increase the proof (R. 85).

the road leading to the stills. The agents observed co-defendants Leroy Sutton (who lived in a house on the petitioner's premises) and Charles Grooms loading whiskey onto a 1940 pick-up truck (R. 54, 152-154). Late that afternoon, a black 1937 Ford coach, with a "bulldog ornament" on the hood, stopped close to a cache of whiskey which was near the main highway in the general area of the stills. A burner, condenser, pressure tank, and whiskey were loaded into the car (R. 56-57, 155). The car and the pick-up truck were the same vehicles which had been previously observed on the petitioner's farm (R. 49-50, 52-53). On many occasions between August 13 and November 1959, Alcohol Tax Unit agents observed the same vehicles on the petitioner's premises (R. 57-58, 63-64, 68-69, 76-77, 79, 90-91, 111-113, 155-156, 166-168, 170, 200).

On August 23, at about 12:30 p.m., an automobile and a large "van-type" truck, both bearing North Carolina license plates, pulled up into the petitioner's farm and the men from the vehicles went into the house (R. 65-66, 75). Shortly thereafter, co-defendants Cleona Hooper and Harry Dorsey (the petitioner's son) drove up to the house and went inside (R. 66). Later, the petitioner and Hooper each brought out a 24-bottle carton of Craig brand isopropyl alcohol which they loaded in Hooper's automobile (R. 66-67). Still later, the petitioner and Hooper loaded a pressure tank and oil burner (commonly used to fire stills in the Cosby section) into the 1937 Ford coach (R. 68). That afternoon, the petitioner and three co-defendants unloaded half-gallon "Lamb" brand fruit

jar cartons out of the North Carolina truck and placed them in a pick-up truck which was driven off by petitioner's son over Ogle Hill on Rooster Town Road (R. 70-73). The son made two additional trips that afternoon, in the same direction, with a load of the fruit jar cartons (R. 70-73). On September 27, 1959, A.T.U. agents searched the house of a co-defendant which was located over Ogle Hill on Rooster Town Road, about two miles from the petitioner's house. They seized 675 gallons of illicit whiskey, 35 cases of which were contained in "Lamb" brand half-gallon fruit jars, and several empty cartons of "Craig" brand isopropyl alcohol (R. 82-84). Agent Roy Tubb testified that he had been investigating illicit distilleries in Cocke County for about fourteen years, and that he had not seen "Lamb" brand fruit jars in that county for about ten years (R. 74). On the same day, the agents seized and destroyed an illicit distillery located on the petitioner's farm about a mile from his house (R. 80-81, 167-168).

On two occasions in early November, A.T.U. agents saw co-defendant Sutton drive up to illicit distilleries in a black 1937 Ford coach and stir mash or operate the stills (R. 93-95, 170, 200-201). On November 15, 1959, the agents executed a search warrant relating to Sutton's house which was on the petitioner's farm, about 250 or 300 yards from the petitioner's house (R. 90, 97-99). The agents seized 17 gallons of illicit whiskey in half-gallon jars, 35 cases of empty half-gallon jars, and a large number of empty cartons of "Craig" brand isopropyl alcohol (R. 98-99). On November 24, Sutton was arrested at his home pursuant

to a warrant. At that time, the agents found 1,740 pounds of sugar, seven oil burners, and pressure tanks of the type to fire stills. Shortly thereafter, the petitioner made arrangements to have bonds executed on behalf of Sutton and another co-defendant (R. 101-102, 253).

On March 24, 1960, the petitioner purchased 120 4x8x16 cinder building blocks, 100 feet of garden hose, and 250 feet of 12.2 Certex inside house wiring (R. 25-26, 32, 39). On April 13, 1960, the agents located and destroyed a distillery on a farm which was located about two miles from the petitioner's (R. 179, 187-188). At the distillery site, the agents found 250 feet of inside electric house wiring, a 12.2 Certex box, 25 feet of garden hose, burners with pressure tank, and 15 cases of empty half-gallon jars (R. 174-177). The furnace around the "still pots" was made out of 175 4x8x16 cinder building blocks, most of which were new (R. 175). The distillery had been "set up" about "two to three weeks" prior to its seizure (R. 179).

3. On September 16, 1959, agents observed three of the co-defendants at a distillery. An agent testified (R. 163; see also R. 192):

> BY THE WITNESS: One of them stated that that "G-d "Pot" and Harry wouldn't even get a watchman for us. They are funny people. They are all for themselves. I tried to get one of them to get Woodrow to watch for us at night, but they wouldn't." He said, "I don't want to go to the G-d pen over these stills."

ARGUMENT

1. Contrary to the petitioner's first contention (Pet. 7-9), the evidence, viewed in its totality, was sufficient, as the court of appeals found (R. 331; Pet. App. 3), to support the conviction; and there is no need for further review. The petitioner's attempt (Pet. 7, 8) to discredit *seriatim* each item of evidence against him as being insufficient to show his connection with the conspiracy ignores the principle that the evidence must be viewed as a whole. At the very least, the evidence was sufficient to show that the petitioner knew of the conspiracy and actively supported it, not merely by furnishing supplies but by affording the conspirators a base of operations. This in itself was the "informed and interested cooperation" which renders petitioner liable as a co-conspirator. See *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713.

2. Before the agent testified to overhearing persons at the still complain about "Pot" and "Harry" not furnishing a watchman (see the Statement, *supra*, p. 6), the following took place (R. 163):

> MR. RAY H. JENKINS [Counsel for the petitioner]: Now, of course, your Honor will instruct the jury as to what anybody said, the men that were present.
>
> THE COURT: Gentlemen of the jury, this alleged statement, alleged to be made by these men, will not be considered except with respect to their cases. Unless the jury finds, first, there was a conspiracy, and, second, that these statements were made in furtherance of the conspiracy. If the jury so finds, then the jury will

> consider the alleged statement with respect to all of the defendants.

The agent then related the conversation and testified that he knew petitioner to be called "Pot" (R. 163).

The petitioner contends (Pet. 9-10) that the trial court erred in admitting this testimony because the conversation was not made pursuant to the conspiracy and because the petitioner "was not identified in the statement." The conversation, however, was made in furtherance of the conspiracy, because security precautions were necessary to the continued operation of the stills. The petitioner was sufficiently identified as "Pot". In addition to the agent, the petitioner and his wife testified that petitioner was known as "Pot" (R. 208, 261), and all of the witnesses from Tennessee knew the petitioner by that name (see R. 24-25, 38, 41-42, 61, 104, 155, 164, 195, 199, 204, 255-256, 260).

The testimony in question was thus properly admitted with the cautionary instruction which the petitioner requested. It is settled that the declarations of a conspirator made in furtherance and during the life of a conspiracy are admissible against absent co-conspirators who are found by independent evidence to have been members of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74-75; *Delli Paoli* v. *United States*, 352 U.S. 232, 237-242; *Blumenthal* v. *United States*, 332 U.S. 539, 550-553.

3. At the trial, the witnesses for the government consisted of Alcohol Tax Unit agents and witnesses connected with the firms which supplied the petitioner with materials. The petitioner, a co-defendant,

and six other witnesses testified for the defense. In its instructions to the jury, the court charged, in part (R. 313-314):

> It sometimes happens in criminal prosecutions, where two or more persons have participated in the commission of crime, that one of those persons becomes a witness for the Government against the other participants. Testimony of such a witness is classified as that of an accomplice. * * *

The judge then gave instructions that the testimony of an accomplice should be viewed with caution and not relied upon too firmly unless corroborated. The petitioner contends (Pet. 10) that, inasmuch as there were no accomplices who testified for the government, this charge was reversible error. Since the petitioner did not object to the charge or call the matter to the attention of the trial court at the time when it could have been remedied, he has no cause to complain on appeal. Rule 30, F. R. Crim. Proc., *supra*, p. 2. Moreover, petitioner can show no prejudice from the instruction even if, as he suggests, the jury might have deemed it applicable to the overheard conversation at the still (*supra*, p. 6). If that were so, the effect of the charge would be that the conversation had to be viewed with caution and corroborated before the jury could use it against petitioner. On this score, the petitioner would have received more than his due.

CONCLUSION

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JULY 1961

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 601728